(6)

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 249

THE EVANGELICAL LUTHERAN SYNOD OF KANSAS AND ADJACENT STATES, a Corporation,
Petitioner,

VERSUS

FIRST ENGLISH LUTHERAN CHURCH of Oklahoma City, a Corporation; FRED H. BLOCH, as Pastor Pretendant of such Church; and E. C. DOERR, J. H. WINNEBERGER, ALBERT SWANSON, STANLEY HOMER, WALTER QUICK, A. E. ROSENTHAL, V. H. SMITH and S. C. HOSHOUR, as Members of the Board of Deacons and Trustees,
Respondents.

BRIEF OF RESPONDENTS' OPPOSING ISSUANCE OF WRIT OF CERTIORARI

J. D. LYDICK,
Petroleum Building,
Oklahoma City, Oklahoma,
Attorney for Respondents.

August, 1943.

UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.

INDEX

AUTHORITIES CITED

In the Supreme Court of
the United States
OCTOBER TERM, 1943

No. 249

THE EVANGELICAL LUTHERAN SYNOD OF KANSAS AND ADJACENT STATES, a Corporation,
Petitioner,

VERSUS

FIRST ENGLISH LUTHERAN CHURCH of Oklahoma City, a Corporation; FRED H. BLOCH, as Pastor Pretendant of such Church; and E. C. DOERR, J. H. WINNEBERGER, ALBERT SWANSON, STANLEY HOMER, WALTER QUICK, A. E. ROSENTHAL, V. H. SMITH and S. C. HOSHOUR, as Members of the Board of Deacons and Trustees,
Respondents.

BRIEF OF RESPONDENTS' OPPOSING ISSUANCE OF WRIT OF CERTIORARI

Comes now your Respondents, the First English Lutheran Church of Oklahoma City, a corporation, *et al* respondents herein and present this as their brief and argument in opposition to petitioners prayer for a Writ of Certiorari.

STATEMENT OF THE RECORD

Except in these particulars the Respondents approve the "STATEMENT" of the record set out at Pages (2)-(5) of the petitioners brief. It is *not true* that the record shows that the Respondents if permitted to withdraw from the Kansas Synod "a sum in excess of Seven Thousand Dollars ($7,000) will be diverted from the Kansas Synod in said period." It was so alleged in petitioner's complaint in the lower court in Paragraph 17 at Page 21 of the record. This conclusion of the amount which would probably be collected in the future from voluntary contributions is denied by the Respondents in their answer at Page 42 of the record. There is no evidence in the record or stipulation of facts supporting petitioner's stated bold conclusion.

We add this to the statement of the record. "Midwest Synod is likewise an orthodox Synod in the United Lutheran Church. The two Synods overlap in some territory" including the State of Oklahoma. See Appellate Court's opinion page (107) record.

When the Respondents withdrew from the Kansas Synod they, at the same time, "affiliated with the Midwest Synod," see Page 107-108 record. The Oklahoma City Church did not step out of the general Lutheran organization, of which the United Lutheran Church of America is the head. The local Lutheran Church never denied the Lutheran faith.

SUMMARY OF RESPONDENTS' ARGUMENT

Following the order of argument submitted by petitioner in its brief we will submit that the Respondent Church is autonomous except as to rights granted by it to the Kansas Synod, that the Respondent Church is the absolute owner of the local church property, is under no obligation to make enforceable payments to the Kansas Synod, that the Kansas Synod owns no property rights involved in this case and that therefore the Kansas Synod has no right to maintin this suit in the Federal Court and that the opinion of the Circuit Court of Appeals is correct.

RESPONDENTS' ARGUMENT

At page 18 of petitioner's brief, the petitioner erroneously makes a statement which is a very *deceitful half truth.* This deceitful half truth is couched in this language:

> "The City Church is not an independent organization, but is a member of a much larger and more important religious organization, and is under its government and control."

Generally and broadly speaking there are two forms of church organization. In one form, all power is vested originally in the general or supreme body. By it local churches are created and given only such power as the general or supreme body grants unto it. In the other form, the individual local churches are the first to exist, each local church being independent and all powerful in

its own affairs. These local independent churches meet together and organize a general body but that general body acquires only such rights and powers as the local churches creating it see fit to give such general body. We refer to the former as being organized from the top down, and the latter as being organized from the bottom up. In the former the hen is first on earth and lays the egg—in the latter the egg is first on earth and hatches out the chicken. The Lutheran Church comes within the second classification, organized from the bottom up.

The dispute in this case first resulted in an appeal from the decision from the Kansas Synod unto the United Lutheran Church in America, commonly referred to by its initials—U. L. C. A. Now that body is one created by the joint action of the various synods in America; it is the supreme Lutheran body of the Church.

Let us look to the church law as announced by the supreme body of the Lutheran Church.

The decision of this supreme Lutheran body is set out in the supplemental complaint of the petitioner as filed in the lower court. Please bear in mind that we are undertaking to determine the extent of the rights and powers of the Kansas Synod. At Page 39 of the record the U. L. C. A., in its decision announced by its Commission of Adjudication says, "*according to the policy of the United Lutheran Church in America, congregations are the primary bodies through which power committed by Christ to the Church is normally exercised. Congregations may, however, for certain ends, unite to form Synods. A Synod is a*

voluntary organization of autonomous congregations, governed by its fundamental laws."

Please note that this supreme Lutheran Church body, the U. L. C. A., has in this very case decided and announced that, in the beginning each local church congregation was *autonomous*—i. e., self-governing. These autonomous local congregations created the Kansas Synod. Now, what rights and powers did the Kansas Synod acquire? This supreme Lutheran body, the U. L. C. A., decided that question also in its decision thus announced and set out at page 38 of the record; it said, "* * * *the Synod has no more power than the congregations uniting in the Synod confer, when they accept the synodical constitution."* In this decision the U. L. C. A. quotes with approval from the well-recognized Lutheran Church Historian, the late Edmund Jacob Wolf, D.D. In his great work entitled "The Lutherans of America" at page 125, this noted authority says, *"The Lutheran Church recognizes in no form of church government any divine right beyond that of the Sovereignty of the individual congregation."*

And so we find it was held by the supreme body of the Lutheran Church that the local congregation, Respondent in this case and referred to by the petitioner here as the "City Church," was in the beginning, fully autonomous—i. e., completely self-governing. The Kansas Synod has no rights except and unless such rights and powers were given unto it by the local congregation, the City Church.

It is elementary that when questions of church law

regulating their internal government "* * * *have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."*

At page 28 of petitioners brief herein, we take this quotation from the decision of this Court in *Watson* v. *Jones*, 13 Wall. 679-20 L. ed. 66. This rule thus cited by the petitioner here is too elementary to justify other citation:

> "While the Court will not recognize the parties agreement as to the laws of the land yet an agreement as to church law of which the Court does not take judicial knowledge is an agreement of *fact* and will be accepted by the Court."

In this case by written stipulation the parties hereto agreed that the decisions of the U. L. C. A. announced through its Commission of Adjudication are "the law of the church and are binding upon the parties to this suit." See p. 49 record.

In the beginning of this discussion we quoted petitioner's statement taken from page 18 of its brief, saying it was a statement of a deceitful half truth. The whole truth, correctly stated is that:

> *"The City Church is an autonomous organization, except wherein it may have conveyed a way and conferred upon the Synod some of its original inherent rights and powers."*

Therefore, to determine what rights and powers the Kan-

sas Synod has, if any, in and over and concerning the property of the City Church we must look and see whether the City Church has given any such rights and powers to the Kansas Synod.

The place to look in order to determine whether the local church has given any such rights and powers to the Kansas Synod is the constitution of the local church and the constitution of the Kansas Synod which the local church accepted when it and the other local churches created the Kansas Synod.

Stipulations of facts were submitted in the lower court. Therein the parties agreed to be correct certain specified excerpts and quotations from the constitutions and by-laws of the Kansas Synod and the City Church. Said supplemental complaint appears at pages 23 and 24 of the record, exhibit A thereto, immaterial here now, at pages 24 to 35 of the record and exhibit B thereto, at pages 35 to 40 inclusive of the record. Now the only constitutional provisions appearing in that supplemental complaint or its exhibits appear at pages 37 and 38 of the record. Therefore, those constitutional provisions appearing at pages 37 and 38 of the record being six in number *are the only constitutional provisions before this Court.* We therefore respectfully decline to give consideration to any other constitutional provisions.

It is true that in the aforesaid stipulation of facts it is recited that the Court may give consideration to certain "excerpts and quotations" from the "plaintiff's brief" sub-

mitted to the lower trial court. Now that said "plaintiff's brief" filed in the lower court is not set out in the record before this Court and *this Court on appeal therefore cannot know and the writer of this brief does not remember what those other excerpts were.* Hence the writer of this brief is not permitted to discuss those stray excerpts not appearing in the record before this Court and *this Court not knowing what they were cannot now consider them.* We submit therefore that this Court cannot give consideration to the extensive alleged constitutional provisions appearing at pages 18 to 24 inclusive of the petitioners brief in this case. The Court is limited to a consideration of the constitutional provision appearing in petitioner's supplemental complaint appearing at pages 37 and 38 of the record.

Please bear in mind we are hunting for constitutional provisions of the Kansas Synod or local church by which the local church gave the Kansas Synod any ownership or right of control of any of the property of the local church.

We have read and reread those six provisions of the constitutions of the Kansas Synod and the City Church: *There is no such provision there. It is very interesting to note that the local church is not required to continually maintain its connection with the Kansas Synod.* The only requirement is that the local city church "shall always be connected with a district Synod * * *." Just any district Synod. The Midwest Synod to which the City Church transferred fills that requirement.

We therefore respectfully submit that in so far as is concerned the ownership and control of the property of the City Church, the City Church is entirely fully and completely autonomous to the complete disregard of the Kansas Synod.

The Respondents respectfully submit that the petitioner is in error at page 26 of its brief where it asserts and thereafter discusses its statement that *"the Kansas Synod as a Superior Church Judicatory has a beneficial interest in the property of the City Church."*

At page 49 of the record is stipulated that, *"The church buildings and the real estate on which same is situated are owned by, and held in the name of, "First English Lutheran Church of Oklahoma City."*

It is important to observe that this city property is not only held in the name of the City Church, but it is further stipulated that said property is actually *"owned by"* the City Church. Apparently, the parties to this suit, when they wrote this stipulation of facts had clearly in mind the distinction between (a) *actually owning the property* and, (b) merely having the property in one's name of record.

Webster's first and preferred definition of the word "Own" is "belonging to one's self." It is very apparent that when the parties wrote this stipulation wherein they recited that this property was held of record "in the name of" the City Church they sought to definitely exclude the idea that the Kansas Synod owned any interest therein. In

order to do so they further stipulated that this property was actually "*owned by the City Church.*" We think that thereby they did definitely negative any claim of any kind of ownership of any sort of an interest by the Kansas Synod.

If perchance by any overdrawn imaginative theory it could be claimed that the Kansas Synod owned any sort of an interest in this property it must be said that such ownership was for the benefit of The United Lutheran Church of America, superior to the Synod, and for the benefit of the entire Lutheran Church body of America. It held such claim merely by virtue of being the Synod to which Respondents then belonged and when Respondents withdrew from the Kansas Synod and joined the Midwest Synod such claim was thereby transferred to the Midwest Synod for the benefit as before of the U. L. C. A. and the entire Lutheran Church body of America.

The claim of the Kansas Synod was transferred to the Kansas Synod's successor, the Midwest Synod. Neither the act of the Respondents in transferring nor the judgment of the Court took away any interest of the general Lutheran Church body of America. *If any Superior Church body owns a beneficial interest in this property it is the U. L. C. A. and not the Kansas Synod.*

Very clearly it appears that when the parties entered into this stipulation stating who actually owned this property, the petitioner had no idea of claiming any interest in this property. It did not assert such ownership in its complaint.

It did not conceive this notion until it had lost in the Circuit Court of Appeals. Like the proverbial ostrich hiding its head in the sand the petitioner here hides from this clearly stipulated fact. It does not even mention the stipulation in its brief.

One pages 27 to 38 inclusive of its brief the petitioner attempts to bolster up its argument by quotations from various judicial decisions. None of these decisions are influential here for two reasons: *First,* in none of those cases did there appear a stipulation of facts like the one here as to who actually owned this property, and, *Second,* because in none of those decisions does it appear that the church involved was organized and existed (like the Lutheran Church) with the local congregations being autonomous and having all the rights and powers not conveyed by them to a general body. In none of those cases does it appear from the opinions of the Court that the general church body had no inherent rights and powers but had only those rights and powers given to it by the local churches.

In most of those cases the church involved had been organized from the top down, had broad inherent powers which it had not relinquished to the local congregation (different from the Lutheran Church).

It does not appear from the opinions there that rules applicable to such churches would be applicable here.

We will observe only the decisions cited from the Circuit Court of Appeals and this Court to show that there

is no conflict between those decisions and the decision of the Circuit Court of Appeals here. *No ground exists for certiorari here.*

At page 27 of its brief petitioner refers to *Watson* v. *Jones,* 13 Wall. 679, 20 L. ed. 666. This is a *Presbyterian Church* case. This is one of those churches organized from the top down where all power originally inheres in the upper body, the *Presbytery.* The local congregation has only such rights and powers as trickles down to it from the Presbytery. In this Presbyterian Church the Court says that the local congregation "*is under (Presbytery's) government and control and bound by its orders and judgments.*" This is not the situation in the case at bar. The local Lutheran congregation is fully autonomous except in so far as any rights and powers given by it to the Synod. No constitutional provision or other Lutheran law appear in the record in this case showing that the local Lutheran Church here ever gave to the Kansas Synod any rights and powers other than ecclesiastical supervision of its adherents to the Lutheran faith. The U. L. C. A., the supreme Lutheran body decided this question in its decision in the appeal; it said at page 38 record "* * * *all Synodical power is simply that of administering the means of grace, and testifying to the truth.* * * *. The Synod has no more power than the congregations uniting in the Synod confer* * * *." Now the United States Supreme Court in this very case said that the decisions of the church on church law must be accepted by the legal tribunals "as binding on them in their application to the case before

them." So out goes this Presbyterian case as a precedent in the case at bar.

Furthermore the parties in the case at bar have covered this question by their own stipulation, by their agreement of record that the local church property is not *merely* held in the name of the local church of record but that it is actually *owned by* the local church.

At page 29 of its brief the petitioner refers to the case of *Barkley et al.* v. *Hayes et al.*, and *Synod of Kansas of the Presbyterian Church, etc.* v. *Mo. Valley College et al.*, 208 Fed. 319, affirmed in 247 U. S. 1.

This is another Presbyterian case. By reference we refer to what we have said above about the frame-work of the Presbyterian Church. The petitioner quotes, at page 25 of its brief, to the effect that the local congregation in the Presbyterian Church holds subject to a "general and ultimate power of control, * * * is under its government and control, and is bound by its orders and judgment." *So entirely different is the Lutheran Church law from this Presbyterian law that this case is no authority here.*

At page 30 of its brief petitioner refers to the *Trustees of the Presbytery, etc.* v. *Westminster Church, etc.*, 172 N. Y. Supp. 851. Council for petitioner *effectively eliminates* this case from consideration by saying at the bottom of page 30 of its brief that "consent was necessary under the organic law of the Presbyterian Church" in order for a local church to sell church property.

At page 31 of its brief petitioner refers to *Purcell et al*

v. *Summers et al.*, 126 Fed. (2d) Supp. 421. *Just why this case is cited and quoted from at length is far beyond our understanding.* Three large, wholly independent, and separately organized national Methodist organizations were in existence.

They consolidated. The new consolidated organization brought a suit against the South Carolina conference which was a part of or subsidiary of one of the three original organizations which was consolidated into the new organization. The latter was claiming church property in its jurisdiction and denying the validity of the consolidation. The new consolidated organization brought suit in the federal court claiming this same church property and asking for a declaratory judgment. It alleged facts which if proven would justify its contention. These facts the South Carolina Conference denied. Now all that the federal court decided was this, "We think that the lower court correctly held that the complaint presented a controversy justiciable in the courts and that the amount necessary to federal jurisdiction was involved."

Of course! That is exactly the question that the Circuit Court of Appeals decided in the case at bar. It decided that upon the record in this case the Kansas Synod owned no interest in the local church property and therefore could not maintain this suit in the federal court.

At page 35 of its brief petitioner refers to the case of *Presbytery of Huron et al.* v. *Gordon et al.*, 300 N. W. 33. This is another Presbyterian case and what we have

heretofore said about Presbyterian Church organizations will suffice here and will also suffice for the next Presbyterian case cited at page 37 of petitioner's brief.

At the bottom of page 37 of its brief petitioner refers to the holding of the Kansas Synod which holding was reversed by the holding of the U. L. C. A., the supreme Lutheran body on appeal as heretofore discussed.

It would be funny if it were not so serious that the petitioner refrains from quoting from the decisions of any Lutheran Church cases. It confines its quotations almost solely to the Presbyterian Church cases. The Presbyterian organizations are so differently constituted that interpretation and application of Presbyterian Church law can have no influence here. At the bottom of page 24 of its brief, presumably to give a little color to its brief petitioner does cite a few Lutheran cases. No quotations are set out. We submit that a reading of those decisions will show no conflict with our contentions here.

At page 38 of its brief the petitioner says and thereafter discusses the statement to-wit:

The City Church is under obligation to make payments to the Kansas Synod under its Constitution.

The record does not support this statement. The only constitutional provisions appearing in the record are the six excerpts appearing at pages 37 and 38 of the record. These are absolutely all of the laws of the Kansas Synod or of the City Church which are before this Court. In none of those excerpts is reference made to payments to

be made by the City Church to the Kansas Synod. Therefore this bold statement by petitioner falls without support.

We apologize for referring to the alleged constitutional provisions appearing at pages 18 to 24 of petitioners brief. They are not in the record. The record before this Court shows that pages 4 to 104 inclusive contains all the record which was before the Circuit Court of Appeals.

We must not be misled by the fact that the trial judge wrote an opinion in the lower court and at pages 80 to middle of page 84 inclusive the trial judge sets out some alleged excerpts of constitutional provisions.. *We do not know where he found them. They are not in the record.* That is the decision from which petitioners appealed and is the decision which the Circuit Court of Appeals set aside. There is no proof in the record that the said constitutions contained such provision. Therefore those excerpts cannot be considered by this Court. *However, none of those constitutional provisions even refer to payments to be made to the Kansas Synod by the City Church.*

We are confident that it is impossible for this Court to consider the alleged constitutional excerpts set out by petitioner at pages 18 to 24 inclusive of its brief because said constitutional provisions do not appear in the record before this Court and did not even appear in the record before the Circuit Court of Appeals. Even if same were to be considered by this Court we find the only financial obligations referred to at page 22 of petitioner's brief.

Even that provision is insufficient to support petitioner's claim. That provision, in substance says that every congregation shall *"make systematic effort to meet"* the demands of the treasurer and "to pay such amounts." There is no requirement that the City Church raise any money or pay any money to the Kansas Synod and there is no amount of money even suggested. It is required merely that the congregation shall *"make systematic effort"* and shall *"make earnest effort to pay."*

Hence even if this Court considers that constitutional provision set out in petitioner's brief but not in the record all that can be said thereof is this—that the Kansas Synod thereby obtained the hope of receiving future voluntary contributions at times indefinite and in amounts uncertain with no method of enforcing the realization of such fond hopes. *This was probably a sweet hope for the Kansas Synod to cherish but like precious faith, hope and charity has no present monetary value sufficient to give the Federal Court jurisdiction.*

We have heretofore called attention to the fact that petitioners conclusion that these contributions would amount to Seven Thousand Dollars ($7,000) in five years is unsupported by proof or stipulation and is denied in our answer at page 42 of the record. It is apparent that if the Kansas Synod could force this congregation, against its will to remain in the Kansas Synod, that the voluntary contributions which it would thereafter make to the Kansas Synod might *not amount to even Seven Thousand Cents in five years.*

We therefore submit that the *Circuit Court of Appeals* is correct in its opinion where it says of these voluntary contributions that the City Church "*may discontinue making them at its election; and the Synod of Kansas cannot exact them under penalty of law.*"

At page 40 of its brief the petitioner says and very briefly discusses this statement to-wit: The Kansas Synod has a right to maintain this *action.*

What we have heretofore said in this brief is sufficient answer to this allegation.

At pages 41 and 42 of its brief the petitioner makes some remarks under the heading of "Conclusion". It says on page 42 that if the City Church be thus permitted to withdraw from the Kansas Synod and join the Midwest Synod it will play havoc with the United Lutheran Church in America. It seems to overlook the fact as shown by the depositions of Rev. Goedde and of Rev. Schroder at pages 53 and 60 of the record, and wholly undenied in this case that a short time ago the Kansas Synod took five separate local churches away from the Midwest Synod, wholly without the consent of the Midwest Synod. The Lutheran Church body of America withstood these transfers without injury. None of these fanciful notions and theories of the Kansas Synod urged here occurred to or seemed sound to the Kansas Synod then. It is apparently the theory of the Kansas Synod that the Lutheran Church law changes to suit its whims.

There is no question here which justifies a writ of *certiorari.*

Respectfully submitted,

J. D. LYDICK,
Petroleum Building,
Oklahoma City, Oklahoma,
Attorney for Respondents.

August, 1943.

⊙